

Supreme Court, U. S.  
**FILED**

JUL 19 1978

MAURICE J. BAKER, JR., CLERK

In The

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1977

\_\_\_\_\_  
No. 77-1840  
\_\_\_\_\_

CAROL MURPHY,

Petitioner,

vs.

LINDA SMITH, aka LINDA DAVENPORT,  
Administratrix of the Estate of William I. Smith, Deceased,  
Respondent.

\_\_\_\_\_  
**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO**  
\_\_\_\_\_

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**INDEX**

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	Page
OPINIONS BELOW .....	1
JURISDICTION .....	2
QUESTION PRESENTED .....	2
CONSTITUTIONAL PROVISION .....	2
STATEMENT OF THE CASE .....	2
ARGUMENT .....	3
CONCLUSION .....	8
APPENDIX	
A. Complaint and Demand for Jury Trial .....	1a
B. Entry of Dismissal .....	3a

## II.

### TABLE OF CASES

	Page
Andrianos v. Community Traction Co., 155 Ohio St. 2d 47, 97 N.E. 2d 549 .....	6
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 Sup. Ct. 217 .....	4
Fleming v. South Carolina Electric and Gas Com- pany, 239 Fed. 2d 277 .....	4, 6
Levin v. Bourne, 117 Ohio App. 269, 192 N.E. 2d 114 (1962) ....	5, 6
Norwood v. McDonald (1943), 142 Ohio St. 299 .....	5
Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E. 2d 723 .....	3, 5, 6, 8
State v. Garden City, 74 Idaho 513, 265 Pac. 2d 328 .....	4, 7

### TABLE OF CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Constitution of the United States .....	2
--	---

### TABLE OF STATUTES

28 U.S.C. § 1257 (2) .....	2
Section 2305.10, Ohio Revised Code .....	2, 3, 5, 6
Section 4515.02, Ohio Revised Code .....	2

### OTHER CITATIONS

16 Am. Jur. 2d, Constitutional Law .....	4
--	---

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### BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

\_\_\_\_\_  
The respondent, Linda Smith, aka Davenport, urges that this Court not assume jurisdiction of this case by granting the plaintiff's petition for writ of certiorari.

### OPINIONS BELOW

In addition to those opinions and entries enumerated in the petitioner's brief, we believe that the original complaint filed by the petitioner against the respondent's intestate on June 21, 1971, and subsequent dismissal of said action after having been called for trial on March 4, 1974, may be of assistance to this Court, and they are incorporated into this brief as Appendix A and B.

## JURISDICTION

Counsel for the petitioner contends that jurisdiction is conferred on this Court by 28 U.S.C. § 1257 (2).

We agree that this Court could only acquire jurisdiction by granting certiorari, but we disagree that this case is one upon which certiorari should be granted.

## QUESTION PRESENTED

Contrary to what is urged on page 2 of petitioner's brief, we submit that there is no constitutional violation of the petitioner's Fourteenth Amendment rights under these circumstances. The single issue which could be considered by this Court on certiorari might be stated as follows:

Do the constitutional guarantees of equal protection require the extension of the statute of limitations for commencing a personal injury action where a statute which *may* affect the rights of the parties has been declared unconstitutional.

## STATEMENT OF THE CASE

On June 21, 1971, the petitioner, Carol Murphy, filed suit in the Common Pleas Court of Hamilton County against defendant's decedent, William I. Smith, for injuries resulting from an automobile accident which occurred on June 26, 1969. At that time, the petitioner-plaintiff was a passenger in the automobile of the respondent's decedent and sustained injuries as a result thereof. Said action was "duly called for trial on or about March 4, 1974, and was dismissed without prejudice." Thereafter, on July 23, 1975, the Supreme Court of Ohio held § 4515.02 of the Ohio Revised Code (commonly known

as the guest statute) unconstitutional. This statute *may* have affected the rights by and between the parties. Thereafter, on April 2, 1976, the plaintiff filed suit in the Common Pleas Court of Hamilton County, Ohio for injuries sustained in the automobile accident of June 26, 1969. Both the trial court and the Court of Appeals for the First District Court of Appeals of Ohio found that the plaintiff failed to bring her claim within the two years provided for in § 2305.10 of the Ohio Revised Code, and, therefore, held that the cause of action was extinguished on June 28, 1971.

## ARGUMENT

Petitioner contends that in rendering the guest statute unconstitutional in *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E. 2d 723, the Supreme Court of Ohio created a new time frame from which the statute of limitations for personal injuries contained in § 2305.10 of the Ohio Revised Code may be commenced.

The petitioner asserts that between the enactment of the guest statute and the decision in the *Primes* case, the Supreme Court of Ohio impliedly approved the guest statute and, therefore, it is "grossly improper and unfair to penalize one, who in good faith relied upon a statute to learn that it was later declared unconstitutional."

We do not argue with petitioner's recitation of the guest statute nor the fact that historically several Courts of Appeal within the appellate framework of Ohio held that the guest statute was constitutional. We further agree that, over the years, the Supreme Court of Ohio has considered various interpretations of the guest statute, but we are unable to find any case in the Supreme Court of Ohio in which

the constitutionality of the guest statute was considered by the Supreme Court of Ohio.

Notwithstanding our agreement with the petitioner in this respect, we vehemently disagree that the constitutional rights of the petitioner have been violated. Petitioner's position is based upon *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 Sup. Ct. 217, *State v. Garden City*, 74 Idaho 513, 265 Pac. 2d 328, *Fleming v. South Carolina Electric and Gas Company*, 239 Fed. 2d 277, and the general recitation in 16 Am. Jur. 2d, Constitutional Law, p. 405.

We do not disagree with the general statement that when a statute has been in effect for some period of time and is later declared unconstitutional, it should not be applied in such a manner as to work a hardship on one who has acted and relied in good faith upon its validity.

We submit that the petitioner's actual circumstance simply does not fall within the meaning of the phrases used in these cases.

Counsel submits that it would be grossly improper and unfair to penalize one who in good faith relies upon a statute only to learn that it was later declared unconstitutional.

In the instant case, the petitioner filed a timely suit in the Common Pleas Court of Hamilton County on or about June 21, 1971. The case had been set for trial many times and was finally dismissed by the trial court for failure to properly prosecute the case. In this case, the statute of limitations for bodily injury began to run on June 29, 1969, upon the occurrence of the facts which constituted the petitioner's cause of action. The two year period ended on June 28, 1971, and the petitioner did, indeed, contrary to her assertion to this Court prosecute a personal in-

jury claim as a result of the alleged negligence and/or willful misconduct of the defendant. The petitioner was neither inhibited nor did the petitioner rely in good faith upon the guest statute but rather saw fit, as the plaintiff in the *Primes* case, to file suit as a result of the injuries sustained. A cause of action under Ohio law may be defined as the "fact or facts which establish or give rise to a right of action, the existence of which affords a party a right to judicial relief." *Norwood v. McDonald* (1943), 142 Ohio St. 299.

The petitioner does not claim that the guest statute inhibited a right of action. The fact that the petitioner filed suit within the time limitation is ample evidence that a cause of action did exist. The guest statute did, however, inhibit a certain class of persons from recovering which class might ordinarily have recovered had it not been for the guest statute.

We submit that if the petitioner felt that her constitutional rights were infringed by the existence of the guest statute, or that an unconstitutional impediment by reason of the guest statute existed, the petitioner had the same right to a determination by the Supreme Court of Ohio or by this Court that the guest statute was unconstitutional. None of the cases cited by counsel for the appellant with respect to one's reliance on an enacted but unconstitutional statute relate to the statute of limitations.

The Ohio Revised Code § 2305.10 stated that:

An action for bodily injury or injury to personal property shall be brought within two (2) years after the cause thereof arose.

The meaning of "action" has been interpreted in *Levin v. Bourne*, 117 Ohio App. 269, 192 N.E. 2d 114 (1962). This case held that:

"The word 'action' in § 2305.10 Revised Code, was said in *Andrianos v. Community Traction Co.*, 155 Ohio St. 2d 47, at page 51, 97 N.E. 2d 549, at page 552, to refer to the nature or subject matter of the occurrence and *not to the form of the remedy . . .*" (emphasis added)

*Levin* and *Andrianos* logically state that the time in which the statute of limitations begins to run is from the time of the wrongdoer's act and excludes from consideration the nature or form of the remedy which is sought in the cause of action complained of.

Applying this logic to the present case, it is obvious that the cause of action arose at the time the petitioner sustained the injuries complained of and not at a later date when the *remedy* she might have pursued was modified by the *Primes* decision. The petitioner must not only assert that the *Primes* case created a new cause of action, but that in addition thereto, it established a new remedy for redress resulting from ordinary negligence to a guest-passenger. The petitioner asks this Court to equate the time when the cause of action arose with the modification of the remedy available to guests after the *Primes* decision. The petitioner further asks this Court to find that she has been deprived of her rights of due process of law when the petitioner has failed to prosecute her claim in a diligent fashion. The petitioner cited the same cases submitted to this Court to the Supreme Court of Ohio.

The cases cited by the appellant for the proposition that an unconstitutional law should not be applied to work a hardship on one acting in good faith do not support this contention. In *Fleming v. South Carolina Electric and Gas Company*, supra, a bus driver ejected a passenger after she took a seat in the front of his bus which had been previously vacated by a white woman. This decision did

not relieve the bus driver from liability merely because he relied upon a then applicable South Carolina statute which allowed segregated seating. The court concluded that:

In most jurisdictions it is held that reliance on a statute subsequently declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon which would otherwise subject him to liability.

In *State v. Village of Garden City*, supra, the Supreme Court of Idaho would not allow operators of slot machines and other gambling devices to operate their business when the court found the statute unconstitutional which would have allowed operations of this type. The Idaho court found that the statute was in contravention of the state constitution.

### CONCLUSION

The instant case does not present a denial of due process of the rights of the petitioner. If the petitioner wished at any time to assert the unconstitutionality of the guest statute during the pendency of the litigation which was filed on June 21, 1971, she could have done so and could have had the same right to a judicial determination of the unconstitutionality as had the prevailing party in the *Primes* case.

For the foregoing reasons, the petitioner's writ of certiorari should be denied.

Respectfully submitted,

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### OF COUNSEL:

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### APPENDIX A

### COURT OF COMMON PLEAS HAMILTON COUNTY, OHIO

NO. A-258034

CAROL MURPHY,  
7564 Edgemont Road,  
Cincinnati, Ohio 45237,

Plaintiff,

vs.

WILLIAM I. SMITH,  
3203 Golden Avenue,  
Loveland, Ohio 45140,

Defendant.

### COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed June 21, 1971)

1. Plaintiff states that on June 26, 1969 at or about 2:30 am she was an occupant in the front seat of a two Seater Austin Healey Sports Car owned and operated by Defendant, northwardly on I-75, a duly dedicated public highway running in a general northerly-southerly direction and located in St. Bernard, Hamilton County, Ohio.

2. Plaintiff further states Defendant permitted two additional occupants in the rear of the said Two Seater Austin Healey Sports Car at the aforesaid time and place.

3. Plaintiff further states Defendant drove said Austin Healey Sports Car with said four occupants at the afore-

said time and place, willfully and wantonly reckless, careless and at such fast speed so as to cause Defendant to lose control of said sports car and to leave the aforesaid highway and turn over approximately Two Hundred (200) Feet north of the Vine Street overpass, St. Bernard, Ohio causing Plaintiff damages and injuries as aforestated.

Plaintiff states Defendant continued his improper willful and wanton driving despite Plaintiff's protestations.

5. Plaintiff states she sustained injuries, pain, suffering, disability, nervousness and permanent disability requiring hospital, pharmaceutical and medical care all due to Defendant's aforestated willful and wanton negligence to her damage in the sum of One Hundred Fifty Thousand and no/100 (\$150,000.00) Dollars.

6. Plaintiff further states Defendant's aforestated willful and wanton negligence caused Plaintiff to lose time from her work and future wage loss totaling Fifteen Thousand and no/100 (\$15,000) Dollars.

7. Plaintiff demands a trial by jury in this matter.

WHEREFORE, Plaintiff prays judgment against the Defendant in the sum of One Hundred Sixty Five Thousand and no/100 (\$165,000.00) Dollars and for her costs herein expended.

/s/ IRWIN KATZMAN

Attorney for Plaintiff  
906 Main Street  
Cincinnati, Ohio 45237  
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## APPENDIX B

Common Pleas Court, Hamilton County, Ohio

No. A-258034

CAROL MURPHY,

vs.

WILLIAM I. SMITH.

DISMISSAL

(Entered March 4, 1974)

Nurre, J.

And now this action being duly called for trial, is dismissed without prejudice and without record at plaintiff's cost.

/s/ C. DONALD HEILE  
Attorney for Defendant

THE STATE OF OHIO )  
 ) SS  
HAMILTON COUNTY )

I, ROBERT D. JENNINGS, Clerk of the Court of Common Pleas, within and for the County and State aforesaid, do hereby certify the within and foregoing to be a true and correct Transcript of the Dismissal, Entered March 4, 1974, Image 77, Judge Thomas Nurre, in the Case No. A258034, wherein Carol Murphy — Plaintiff, Wm. I. Smith — Defendant, as appears from the files and records now in my office.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the Seal of said Court, at Cincinnati, this 14 day of April, A.D. 1976.

**ROBERT D. JENNINGS,**  
Clerk of the Common Pleas Court  
of Hamilton County, Ohio.

By /s/ MARILYN BLACK, Deputy